IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 11TH DECEMBER 2007 / 20TH AGRAHAYANA 1929

SA.No. 885 of 1994()

AS.36/1988 of ADDL.DISTRICT COURT, THRISSUR
OS.109/1983 of IST ADDL.SUB COURT,THRISSUR
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APPELLANT/ APPELLANT/ PLAINTIFF

SOUTHERN UNION PHARMACEUTICALS
MUSEUM ROAD, TRICHUR, REP.BY
ITS PARTNER (NAME SUBSTITUTED).

SOUTHERN UNION PHARMACEUTICALS (KERALA PVT. LTD., MUSEUM ROAD, TRICHUR REP.BY ITS PARTNER S SUBSTITUTED AS THE APPELLANT AS PER ORDER DT. 20.2.07 ON IA.174/07.

BY ADV. SRI.N.SUKUMARAN
SRI.S.SHYAM

RESPONDENTS/ RESPONDENTS/ DEFENDANTS
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1. STATE OF KERALA, REP.BY
THE DISTRICT COLLECTOR,
TRICHUR.

2. THE SPECIAL TAHSILDAR (R.R),
TRICHUR.

BY GOVERNMENT PLEADER SRI.L.G.SURESH BABU

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SA. NO.885/1994

ORDER ON CMP. NO.1966/1994 IN SA. NO.885/1994

DISMISSED

11.12.2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A.TO JUDGE

tss

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 885 OF 1994

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DATED THIS THE 11th DAY OF DECEMBER, 2007

JUDGMENT

Plaintiff Southern Union Pharmaceuticals, Thrissur, in O.S.109 of 1983 on the file of Sub Court, Thrissur is challenging dismissal of the suit concurrently by the courts below. Appellant instituted the suit seeking a permenant prohibitory injunction from taking any steps or initiating proceedings under Revenue Recovery Act for realisation of the amount contending that as against the order passed by the Excise Inspector an appeal is pending before the Excise Commissioner, Board of Revenue and before the disposal of the appeal, amount cannot be realised by recourse to revenue recovery proceedings. It was also contended that the orders passed by the Excise Inspector on 30.8.1982 are against law and in violation of the rules provided under Abkari Act 1 of 1077 and Kerala Rectified Spirit Rules issued by the government under Abkari Act. Respondents resisted the suit contending that the appeal filed by appellant before the Excise Commissioner was rejected and without impleading the Excise Department, suit is not maintainable and it is the duty of the respondent to collect the arrears as per the

provisions of Revenue Recovery Act and the wastage of alcohol was not calculated as per the notification as contended by appellant but under Rule 13 of Kerala Rectified Spirit Rules and the action taken by the Excise Inspector is not in contravention of relevant rules and therefore appellant is not entitled to the decree sought for.

2. Learned Munsiff, on the evidence of Exts.A1 to A17, B1 to B3, PW1 and DWs 1 and 2 dismissed the suit. Appellant challenged the judgment before District Court, Thrissur in A.S.36 of 1988. Learned Additional District Judge, on reappreciation of evidence, found that appellant is not entitled to a decree for injunction without impleading the Excise Department and without seeking a decree for declaration and dismissed the appeal. It is challenged in the second appeal.

3. Though notice was issued in the second appeal, no substantial question of law was formulated.

4. Learned counsel appearing for the appellant and learned Government Pleader were heard.

5. The argument of the learned counsel appearing for appellant is that in view of the decision of this court in **Enoch Pharma V. State of Kerala and others**(1965 KLT 415) whereunder Rule 38(1) of Medicinal and Toilet Preparations

(Excise Duties)Rules 1956 was struck off as ultra vires of the powers of the rule making authority, the disputed amount is sought to be realised as due under Medicinal and Toilet Preparations (Excise Duties)Rules 1956, courts below should have granted the decree sought for. Learned counsel argued that in view of the decision of the Constitution Bench of the Apex Court in **Synthetics and Chemicals Ltd and others V. State of U.P and others** (1990(1) SCC 109) State is not entitled to realise any amount by levying duty on rectified spirit and therefore appellant is entitled to the decree sought for.

6. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal, on the facts and circumstances of this case. The suit was instituted challenging the revenue recovery proceedings initiated by the District Collector and the Special Tahsildar on the request of Excise Department, contending that as against the order of the Excise Inpsector, an appeal is filed and it is pending and also contending that under the relevant rules, no duty is payable. Appellant did not implead the Excise Department and did not seek a decree for declaration of the right of the Excise Department to claim duty on the recitified spirit. As rightly found by first appellate court, in such circumstances without the

Excise Department on the party array and without seeking a decree for declaration with regard to liability to pay dues, appellant is not entitled to a decree for permanent prohibitory injunction restraining District Collector or Tahsildar from realising the amount. Though it was contended that as against Ext.A1 and A2 orders passed by the Excise Inspector, Ext.A9 appeal was pending, in the written statement itself it was pleaded that the appeal was rejected. Ext.A17 order produced by appellant also shows that appeal challenging Ext.A1 and A2 orders were dismissed by the Board of Revenue. In such circumstances, unless appellant gets a declaration that he is not liable to pay the duty demanded under Ext.A1 and A2 and without challenging Ext.A17 order, he is not entitled to the decree for injunction sought for.

Appeal is therefore dismissed. Appellant is entitled to challenge Ext.A17 order in appropriate proceedings.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-